# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. NANCY M. BANNON** **PART** **42**

***Justice***

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MICHAEL S. HYMES and KATHLEEN HYMES,

Plaintiffs,

- v -

MARQUIS NEW YORK, LLC, 11 SHIPWRECK LLC, and CHARLES MILITE,

Defendants.

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**INDEX NO.** 655517/2021

**MOTION DATE** 5-31-22

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52, 53, 54, 94, 95, 96, 98

were read on this motion to/for DISMISSAL.

## I. INTRODUCTION

In this action seeking damages for breach of contract and fraud arising from a vacation rental agreement, the defendant property rental company, Marquis New York, LLC (Marquis), moves, pre-answer, to dismiss the amended complaint pursuant to CPLR 3211(a)(1) and (a)(7) (MOT SEQ 002). The instant motion was initially denied pursuant to 22 NYCRR 202.27 by decision and order dated March 30, 2022, upon the movant's failure to appear for oral argument.

The plaintiffs, Michael S. Hymes (Michael) and Kathleen Hymes (Kathleen), then moved pursuant to CPLR 3215 for leave to enter a default judgment against Marquis (MOT SEQ 003). Marquis opposed the motion and cross-moved pursuant to 22 NYCRR 130-1.1 for sanctions against the plaintiffs for frivolous motion practice. Marquis also separately moved pursuant to CPLR 5015 to vacate the Court's March 30, 2022, order, entered upon its default (MOT SEQ 004). By decision and order dated May 31, 2022, the Court, *inter alia*, denied the plaintiffs' motion for default judgment and Marquis's cross motion for sanctions (SEQ 003) and granted

Marquis's motion to vacate (SEQ 004). Accordingly, the Court vacated its March 30, 2022, decision and order and restored Marquis's motion to dismiss the amended complaint (SEQ 002) to the calendar.[1] The plaintiffs oppose the motion. The plaintiffs and Marquis filed unauthorized sur-replies. Neither will not be considered. For the following reasons, the motion is granted.

## II. BACKGROUND

The following facts, drawn from the allegations in the plaintiffs' amended complaint and the properly submitted documentary evidence, unless otherwise noted, are assumed to be true solely for purposes of this motion. See Grassi & Co. v Honka, 180 AD3d 564, 564 (1st Dept. 2020). While the plaintiffs purported to file a second amended complaint in conjunction with their opposition to Marquis's motion, they neither moved for leave from the Court, nor obtained the defendants' stipulated consent, to further amend their pleadings, as required by CPLR 3025(a) and (b). Accordingly, the second amended complaint is procedurally improper and a nullity. See Khedouri v Equinox, 73 AD3d 532, 533 (1st Dept. 2010); Nikolic v. Fed'n Emp't & Guidance Serv., 18 AD3d 522, 524 (2nd Dept. 2005).

Marquis markets curated luxury vacation rentals online through its website, staymarquis.com (the website). The plaintiffs visited Marquis's website in or about early 2021 and viewed a luxury vacation home available for rental called "Shipwreck Beach House", located at 11 Shipwreck Drive in Amagansett (the premises). According to the plaintiffs, the website advertised the premises as "spectacular and memorable," and advertised Marquis's services as providing a "stress free and enjoyable and honest luxury vacation home rental experience" during which consumers "would not get tricked by marketing materials that inaccurately depict the rental." Screenshots submitted by the plaintiffs include general claims by

[1] By stipulation dated May 20, 2022, the plaintiffs discontinued the action as against defendants 11 Shipwreck LLC and Charles Milite.

Marquis that rentals through its website are "seamless" and "hassle free," and a message from Marquis's founders stating that they founded Marquis after a bad rental experience in 2009, "vow[ing] to never let that happen to anyone ever again."

On February 2, 2021, Michael executed a written agreement (the Booking Agreement) providing for his rental of the premises for the period of June 30, 2021 through July 31, 2021, for the sum of $83,439.74. The premises were owned by defendant Charles Milite (Milite), who also executed the Booking Agreement. There were no other signatories to the Booking Agreement. The Booking Agreement provided that:

> This Booking Agreement (this "Agreement"), is entered into . . . by and among the "Member" and the "Guest" (as each are defined on the booking confirmation page viewed and accepted by the Guest as a condition precedent to being presented with this Agreement (the "Booking Page")), and Marquis, as defined in Section 10(s), herein ("Marquis"), as an intended beneficiary with respect to, but only with respect to, those particular provisions within which Marquis is explicitly referenced. The Member and Guest may be referred to as the "Parties" and each individually as a "Party" throughout this Agreement.

The Booking Agreement further provided that, "the Member is the manager or owner," of the premises, which "the Guest desires to rent", and that "the Parties agree to be bound by the terms and conditions of this Agreement as they relate to the Reservation of the Property . . . ."[2]

The plaintiffs received confirmation of their booking and made an initial payment toward their total rental fee on the morning of February 5, 2021. Later that afternoon, the CEO of Marquis sent an email to Michael stating, *inter alia*, that Marquis's Head of Housekeeping "will be coordinating a deep cleaning of the property prior to your arrival at our expense." However,

[2] The "booking page" referenced in the Booking Agreement does not appear to have been filed. The exhibit submitted by Marquis labeled "booking page" is a confirmation email to Michael sent by Marquis on February 5, 2021, after the Booking Agreement was executed. Thus, it cannot have been accepted by Michael "as a condition precedent to being presented with" the Booking Agreement. Moreover, the confirmation email does not define either "Member" or "Guest." Nevertheless, a review of the Booking Agreement as a whole makes plain that Michael is the "Guest" and Milite is the "Member".

when the plaintiffs arrived at the premises four months later, at the commencement of the rental period, they found the premises unclean and in poor condition. Nevertheless, the plaintiffs did not vacate the premises and demand a refund, but instead remained at the premises and undertook to oversee efforts to correct the defects found therein.

The plaintiffs thereafter commenced this action with the filing of their initial summons and complaint on September 17, 2021, which was followed by the operative, amended complaint on November 22, 2021. The amended complaint asserts causes of action against Marquis for breach of contract, breach of an implied contract, and actual and constructive fraud, and seeks recission of the booking agreement and a refund of the contract price thereunder. The instant motion then ensued.

## III. LEGAL STANDARD

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). A particular paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable." See VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (1st Dept. 2019), quoting Fontanetta v John Doe 1, supra.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 (2002). To

determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference," and determine only whether the facts, as alleged, fit within any cognizable legal theory. Id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 (2013); Simkin v Blank, 19 NY3d 46 (2012); Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 (1977).

## IV. DISCUSSION

To sufficiently plead a cause of action for breach of contract, a plaintiff must allege the existence of a contract, the plaintiff's performance thereunder, the defendant's breach, and resulting damages. See Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dept. 2010). Here, the plaintiffs' breach of contract claim must fail because the documentary evidence demonstrates that there was no contract between the plaintiffs and Marquis.

It is well settled that "privity between a plaintiff and a defendant is required to support a breach of contract claim." Tutor Perini Bldg. Corp. v Port Auth. of New York and New Jersey, 191 AD3d 569, 570 (1st Dept. 2021); see Freeford Ltd. v Pendleton, 53 AD3d 32, 38 (1st Dept. 2008). Accordingly, a breach of contract claim asserted against a defendant that "was not a party to the agreements sued upon" is fatally defective and subject to dismissal. Veneto Hotel & Casino, S.A. v German Am. Cap. Corp., 160 AD3d 451, 452 (1st Dept. 2018); see Randall's Island Aquatic Leisure, LLC v City of New York, 92 AD3d 463, 463 (1st Dept. 2012) ("There can be no breach of contract claim against a non-signatory to the contract.").

No privity exists between the plaintiffs and Marquis with respect to the Booking Agreement, which is fatal to the plaintiffs' breach of contract claim. As explained in the defendant's motion papers, Marquis's business is organized such that property owners may list their rental properties on Marquis's website for potential guests to browse and, once a suitable rental property is found, the prospective guest may enter into a booking agreement *directly* with the property's owner. Marquis serves to facilitate, and is a third-party beneficiary of, these agreements. Here, the plaintiff's breach of contract claim rests upon their own Booking Agreement for the subject premises. However, consistent with the defendant's description of its business, the Booking Agreement was solely executed by Michael and Milite, the owner of the premises, but not by any representative of Marquis. Indeed, the Booking Agreement explicitly states that it is an agreement "by and among the 'Member' [i.e., Milite] and the 'Guest' [i.e., Michael]," who together constitute the "Parties" to the agreement, while Marquis is expressly defined as only "an intended beneficiary" to those portions of the contract in which it is referenced by name. Accordingly, the breach of contract claim, insofar as it is asserted against Marquis, is fatally defective because Marquis is not a party to the Booking Agreement.

The plaintiffs also contend, to no avail, that a separate contract was formed between themselves and Marquis by virtue of the February 5, 2021, email to Michael from the defendant's CEO promising a "deep-cleaning" of the premises prior to the plaintiffs' arrival. However, an enforceable agreement requires "an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound[,]" and "the parties' meeting of the minds must include agreement on all essential terms." Ostojic v Life Med. Techs., Inc., 201 AD3d 522, 523 (1st Dept. 2022), citing Kowalchuk v Stroup, 61 AD3d 118, 121 (1st Dept. 2009). "An exchange of emails may constitute an enforceable agreement if the writings include all of the agreement's

essential terms, including the fee, or other cost, involved." Kasowitz, Benson, Torres & Friedman, LLP v Reade, 98 AD3d 403, 404 (1st Dept. 2012). The plaintiffs do not allege all the necessary elements of an enforceable agreement with respect to the email exchange at issue, nor are those elements apparent in the email itself. Most conspicuously, the plaintiffs did not offer any consideration in return for the "deep-cleaning" of the premises. Indeed, the only price referenced in the email correspondence is not consideration for any new and separate agreement with Marquis, but rather, is the roughly $83,000 rental fee the plaintiffs were already obligated to pay under the fully executed Booking Agreement. Therefore, no enforceable agreement exists between the plaintiffs and Marquis based on the February email exchange.

The plaintiffs' claim for breach of implied contract is likewise subject to dismissal. "'The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.'" Melcher v Apollo Med. Fund Mgmt. L.L.C., 105 AD3d 15, 27 (1st Dept. 2013), quoting Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 (1987). That is, "'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment." Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., supra. Here, there is an express written agreement—the Booking Agreement—that governs the subject matter underlying the quasi contract claim, namely, the plaintiffs' rental of the subject premises for the agreed-upon rental fee. As such, recovery on the plaintiffs' claim sounding in quasi contract is precluded. See Melcher v Apollo Med. Fund Mgmt. L.L.C., supra.

The plaintiffs' fraud claims are also subject to dismissal. "'The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent

to induce reliance, justifiable reliance by the plaintiff and damages.'" Epiphany Community Nursery Sch. v Levey, 171 AD3d 1, 8 (1st Dept. 2019), quoting Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 (2009). Further, "[a] claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)." Eurycleia Partners, LP, supra at 559; see LaSalle Nat'l Bank v Ernst & Young LLP, 285 AD2d 101, 109 (1st Dept. 2001) ("each element [of a fraud claim] must be pleaded with particularity").

The plaintiffs' allegations lack the particularity required to state a claim for fraud. The plaintiffs vaguely plead that Marquis and the other named defendants made misrepresentations through their marketing materials and communications regarding the condition of the premises; that they did so to induce the plaintiffs to enter into the Booking Agreement; and that the plaintiffs executed the rental contract in reasonable reliance on these misrepresentations. These allegations do not, however, articulate which defendant made which alleged misrepresentation, when the alleged misrepresentations were purportedly made, what the alleged "marketing materials" consisted of, or what form the purported "communications" took. See Jonas v Nat'l Life Ins. Co., 147 AD3d 610, 612 (1st Dept. 2017) (dismissing fraud claim for, *inter alia*, "impermissibly lumping together all defendants"); E1 Entm't U.S. LP v Real Talk Entm't, Inc., 85 AD3d 561, 562 (1st Dept. 2011) ("complaint must state who made the misrepresentation to whom, the date the misrepresentation was made, and its content"). Nor do the plaintiffs offer anything more than conclusory allegations regarding Marquis's knowledge of falsity and intent to defraud, which is insufficient to sustain their claim. See Zanett Lombardier, Ltd. v Maslow, 29 AD3d 495, 496 (1st Dept. 2006). Moreover, the plaintiffs' allegations "merely restate[] the breach of contract claim in terms of fraud and misrepresentation[,]" and "[i]t is well settled that a

cause of action for fraud will not arise when the only fraud charged relates to a breach of contract." Gordon v Dino De Laurentiis Corp., 141 AD2d 435, 436 (1st Dept. 1988).

There is no merit to the plaintiffs' argument that the requisite particularity in pleading is present with respect to the representation that the premises would be deep-cleaned. The amended complaint does not allege when, where, or by whom this representation was made. Those details emerge only upon review of the February 2021 email exchange in which Marquis's CEO made this representation, which was submitted for the first time in opposition to the present motion. Indeed, while a representation regarding the deep-cleaning of the premises is repeatedly alleged, the February 2021 email exchange is neither explicitly referenced in, nor attached to, the amended complaint. Further, even assuming, *arguendo*, that there is sufficient particularity with respect to the who, where, and when of this representation, the conclusory allegations concerning Marquis's knowledge and intent are still insufficient. Indeed, the representation that the premises would be deep-cleaned could not have fraudulently induced or been relied upon by the plaintiffs to enter into the rental contract given the emailed representation was sent after the plaintiffs had already executed the Booking Agreement. And, in any event, "[a] fraud claim is not sufficiently stated where it alleges that a defendant did not intend to perform a contract with a plaintiff when he made it, as, in essence, [the] plaintiffs' [fraud claim] here alleges." Gordon v Dino De Laurentiis Corp., supra.

The constructive fraud claim suffers from substantially the same fatal defects as the cause of action for actual fraud. See Del Vecchio v Nassau Cty., 118 AD2d 615, 617-18 (2nd Dept. 1986) (listing elements of constructive fraud). Moreover, the plaintiffs fail to allege the existence of a fiduciary or confidential relationship with Marquis, as is required to state a claim for constructive fraud. See id. A "fiduciary relationship exists between two persons when one of

them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." EBC I, Inc. v Goldman Sachs & Co., 5 NY3d 11, 19 (2005). "Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions." Id. The plaintiffs' bare, conclusory allegation that a fiduciary relationship existed between themselves and Marquis is plainly insufficient. More than that, it is belied by the facts the plaintiffs allege, which describe nothing more than an arms-length transaction that does not give rise to a fiduciary relationship. See id.; Frydman & Co. v Credit Suisse First Boston Corp., 272 AD2d 236, 237 (1st Dept. 2000); Wiener v Lazard Freres & Co., 241 AD2d 114, 122 (1st Dept. 1998).

Finally, to the extent the plaintiffs allege they are entitled to recission of the contract, "the equitable remedy of rescission is not available where[,]" as here, "there is an adequate legal remedy." Empire Outlet Builders LLC v Constr. Res. Corp. of New York, 170 AD3d 582, 583 (1st Dept. 2019).

## V. CONCLUSION

Accordingly, it is

ORDERED that the defendant Marquis New York, LLC's motion to dismiss the amended complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) is granted, and the amended complaint is dismissed in its entirety.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

6/14/2023
DATE

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